LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-974

WEST PENN POWER COMPANY,
a corporation,
Petitioner,

v.

RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:
ROSE, SCHMIDT AND DIXON
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
ROSE & KUSHNICK
919 Eighteenth Street, N.W.
Washington, DC 20006

Respectfully Submitted,
HAROLD R. SCHMIDT
LAWRENCE A. DEMASE
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
MICHAEL G. KUSHNICK
919 Eighteenth Street, N.W.
Washington, DC 20006
Counsel for Petitioner,
West Penn Power Company

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-974

WEST PENN POWER COMPANY,
a corporation,
Petitioner,
v.
RUSSELL TRAIN, Administrator of the Environmental Protection Agency of the United States of America, MAURICE K. GODDARD, individually and as Secretary of the Department of Environmental Resources and DEPARTMENT OF ENVIRONMENTAL RESOURCES of the Commonwealth of Pennsylvania,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

The federal respondent, Administrator of the Environmental Protection Agency (hereinafter "Administrator"), has noted in his brief the decision of this Honorable Court to review the conflict among the circuits on the question whether Section 10 of the Administrative Procedure Act, 5 U.S.C. 704, grants subject-matter jurisdiction to the district courts to review agency action. *Mathews v. Sanders,* No. 75-1443. This issue is one of the issues presented by West Penn Power Company's (hereinafter "West Penn") Petition For Writ Of Certiorari. See Pet., p. 2. However, while the Administrator concedes the necessity for this Honorable Court's review

OUGH POOR COPY

of the question, he nevertheless argues in opposition to granting certiorari in this case or to defer disposition of this case pending the Court's decision in *Mathews,* apparently in the belief that the notice of violation is not a final order. See Brief in Opp., pp. 5-7. The Administrator completely ignores West Penn's assertions that unless review of the Administrator's action is obtained, West Penn will have been deprived of due process of law. See Pet., pp. 20, 21.

West Penn submits that the Section 10 question raised in *Mathews* is substantially different from the Section 10 question raised by West Penn's Petition For Writ Of Certiorari. *Mathews* involves Section 205(h) of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405(h) which specifically provides that, "[n]o . . . decision of the Secretary [of Health, Education and Welfare] shall be reviewed by any person, tribunal or government agency except as [t]herein provided." The Clean Air Act, under which the instant case arises, contains no such prohibition. Additionally, there appears to be less conflict among the circuits in cases involving the Social Security Act, as even the Court below has determined that Section 10 of the Administrative Procedure Act provides an independent basis for subject-matter jurisdiction in Social Security Act cases. See, *Davis v. Richardson,* 460 F.2d 772 (3d Cir. 1972). Accordingly, a resolution of the Section 10 issue in *Mathews* may well not be dispositive of the issues here. West Penn, therefore, believes that a concurrent resolution of the issues raised in this case with those in *Mathews* will allow this Honorable Court to fully explore the situations in which Congress intended that judicial review of agency action under Section 10 of the Administrative Procedure Act is to be available.

BLEED THROUGH

The penalizing effect of the Administrator's action, i.e., the issuance of the notice of violation and the compliance order which followed in due course, is the subject of this proceeding and it has not abated. (The Administrator has conceded that the Court below erred in its determination that the decision to issue a notice of violation is a discretionary action and, therefore, unreviewable. See Brief in Opp., p. 6, m.3.)[1]. The pending notice of violation together with the Administrator's position that a state-granted variance is not effective to prevent federal enforcement of the implementation plan (see Brief in Opp., p. 5) prevents the amelioration of such effects. This is illustrated by the fact that West Penn has been unable to execute an agreement it had reached with the respondent, Pennsylvania Department of Environmental Resources, in settlement of West Penn's variance application because West Penn was unable to obtain the Administrator's approval of the agreement. This alone confirms West Penn's argument that a notice of violation has an independent coercive effect, is a clear impairment of substantive rights, and constitutes "final agency action." It also serves to illustrate the constitutional infirmity of the holding of the Court below, which has deprived West Penn of any meaningful opportunity to establish the invalidity of the notice of violation.

---

[1]Although not a matter of record, West Penn believes that, at least on one occasion and possibly another, West Penn has been rejected for participation in a government sponsored research and development program involving flue gas desulfurization projects at the Mitchell Power Station, Boiler No. 33, because of the outstanding notice of violation and the threat of impending enforcement action, which together have resulted in West Penn's being coerced into proposing to the contracting agency an unreasonably short timetable for completing the proposed program.

POOR COPY

In short, the matters raised in West Penn's Petition For Writ Of Certiorari involve distinct and important issues which should be reviewed by this Court.

West Penn requests that an expedited briefing schedule be established so that the issues raised in the instant case can be considered by this Honorable Court concurrently with those raised in *Mathews*.

BLEED THROUG

CONCLUSION

For these reasons and those set forth in West Penn's Petition, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

HAROLD R. SCHMIDT
LAWRENCE A. DEMASE
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
MICHAEL G. KUSHNICK
919 Eighteenth Street, N.W.
Washington, DC 20006
Counsel for Petitioner,
West Penn Power Company

Of Counsel:
ROSE, SCHMIDT AND DIXON
Ninth Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
ROSE & KUSHNICK
919 Eighteenth Street, N.W.
Washington, DC 20006

Dated: June 11, 1976

POOR COPY